at certain points it contends that the relevant comparison point is when the incumbent telephone (and perhaps electric) company entered the market.

46. In this regard, Alexander Graham Bell invented the key elements of the modern telephone in 1875 and filed his historic patent application on February 14, 1876. Telephone service quickly spread across the country thereafter such that by the late nineteenth century most communities had service.[10] Some areas were served by the Bell system (and its predecessors); others were served by the thousands of independent phone companies that had sprung into existence. Electric service followed telephone service shortly thereafter with most major cities having electric service by the mid-1890's. Chibardun is thus contending in part that state and local laws and agreements relating to telecommunications providers and the rights-of-way must be rolled back to the horse drawn carriage era of the late nineteenth century.

47. As this Commission is well aware, in the late nineteenth century environmental laws and requirements were in their infancy, at best. Laws and requirements relating to health and safety were not very advanced compared to today's standards. Examples of some environmental, health and safety laws and requirements applicable to telecommunications providers are set forth at ¶ 58 and following, below. All date from after World War II. Chibardun's request to repeal the last century's worth of state and local environmental, health and safety requirements as they apply to telecommunications providers requires an EIS.

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[10] Chibardun, for example, states that it (or its predecessor) started providing phone service in 1907. Petition, at 2.

48. Cold War Era Comparison. Chibardun's occasional references to conditions imposed upon Marcus Cable and when Marcus entered the market indicate Chibardun may be suggesting a more recent reference point for "competitive neutrality" comparisons. In this regard, cable companies first started operation in approximately 1948. Municipalities nationwide started franchising cable television providers in significant numbers in the 1950's. By 1990 most urban areas had cable service and cable's geographic expansion was largely complete. The "entry into the market" by cable service providers thus roughly coincided with the Cold War.

49. Again, there was a substantial expansion in health, safety and environmental laws between 1950 and 1990. Most of our nation's current environmental laws were enacted in that time period (generally in the later portions of it). There was a significant expansion in health and safety laws during this time period as well. An EIS is required if these laws and requirements are going to be preempted. In addition, cable television systems were built first in some of the most scenic, environmentally sensitive areas of the country. This is because cable television in its origin (as "community antenna television") predominantly brought cable service into mountain valleys and isolated areas where the same geography that creates an attractive (and fragile) environment also prohibited the propagation of line of sight television signals into valleys. Thus, to the extent the Commission uses the cable TV/Cold War era as the appropriate demarcation point for comparison it will have a disproportionate impact on these more environmentally sensitive areas because their environmental, health and safety requirements will be "frozen" at an earlier point in time. An EIS is thus required.

50. More generally, whatever demarcation point the Commission picks, under Chibardun's request it will be preempting future environmental, health and safety requirements. An EIS is thus required.

51. Requirements Must Apply to All Providers. Chibardun also asks this Commission to preempt any state or local requirements unless they apply to all providers. Which providers are meant is not entirely clear as Chibardun variously refers to GTE; to both GTE and Marcus Cable; and at other times to unspecified other utilities as well. For Chibardun's claims in this regard see its request to preempt a City right-of-way ordinance "placing higher fees, and more stringent conditions and restrictions, upon newcomers only"; and Chibardun's repeated contention that the restrictions that it is challenging are invalid because (citing this Commission's decision in the Troy case) they are only imposed on "new entrants." Petition, at 20, 21 and following.

52. Other industry commenters repeat and support Chibardun's claims in this regard. See, for example, AT&T's comments that the License Agreement is invalid because it "would impose significant obligations on a new entrant -- Chibardun -- that are not borne by the incumbent local exchange carrier, GTE." Comments of AT&T Corp., at 3.

53. This Commission should be aware that in many states, including Michigan, existing telephone providers in substance contend that they have "vested rights" under the franchise or other permission given them to occupy the public rights-of-way decades or a century ago (such as when they started businesses in the late nineteenth century).[11] They then contend that states and local

[11] The Commission summarized such claims in Part 3 of Appendix C of its decision in the Troy case. *See* ¶¶ 35, 39-40, and 46-50 of Appendix C. For example, in paragraph 39, the Commission said that the Michigan Cable Television Association ("MCTA") stated that "Ameritech

units of government cannot unilaterally impose any additional requirements, at least until the provider's franchise or current rights expire. Such claims have variously been made under the contracts clause of the U.S. Constitution (that any new requirements imposed by state or local units of government unlawfully infringe on the provider's contract rights under the franchise as originally granted); (2) -- under state laws relating to utility franchising or the rights of municipalities, (3) -- under purported limitations on municipal authority contained in specific municipal charters, ordinances, and franchises.[12]

54. In addition, incumbent telephone companies (or electric companies, if that is the relevant comparison) often contend that they have franchises of unlimited duration or which have

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claims to have been granted a franchise by the state before the Michigan Constitution was amended [in 1908] to give municipalities franchising authority. MCTA believes that Troy is assuming that 'the contract clause of the Michigan and Federal Constitutions prohibits Troy's right to impair or regular Ameritech's existing franchise.'" Troy, Appendix C, ¶ 39. And at paragraphs 46 and following of Appendix C, the "incumbent question" and how to address it is discussed at some length, including recommendations from this Commission's Local and State Government Advisory Committee. Id at ¶ 46.

A number of states have similar turn-of-the-century telephone franchise provisions. See, for example, Tennessee Code Annotated Section 65-21-201 codifying an 1885 Tennessee franchise law authorizing companies in the telephone business to construct laws "along and over the public highways and streets of cities and towns." This statute has recently been held to be in full force and effect and to allow modern companies operating under it to install microwave towers and underground fiber optic cables. Brannan v. AT&T, 210 Tenn. 697; 362 S.W.2d 236, 239 (1962); AT&T v. Proffitt, 903 S.W.2d 309, 312-313 (Tenn. App. 1995).

[12] For example, franchises sometimes purport to restrict the applicability to the provider of subsequent ordinances, such as reciting that only subsequent ordinances "of general applicability to businesses in the city" shall apply or that ordinances which "interfere with the rights and obligations hereby granted" are inapplicable. But these contradict the general principle of municipal law that one municipal commission cannot bind subsequent municipal commissions.

long time periods in which to run, for example from 10 to 50 years. In some states, court decisions have affirmed the preceding contentions.[13]

55. As noted above, this Commission in part described the preceding types of claims in Appendix C to its decision in the Troy case. In addition, this Commission has had some exposure to claims by providers that new regulatory requirements could not be unilaterally imposed on them in both this Commission's cable TV customer service proceedings and in its cable TV rate regulation proceedings. For example, in the customer service proceedings, cable companies insisted that no new customer service requirements could be imposed unilaterally by a community:

> "[M]ost cable operators contend that any new customer service standards to be adopted by local authorities may only be imposed after the expiration of existing franchise agreements. These commenters suggest that the imposition of new customer service requirements in mid-term undermines franchise renewal expectancies and could violate the Contracts Clause of the United States Constitution." In re Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer Service, FCC 93-145, at ¶ 24 (March 11, 1993) (footnotes omitted); *see also* ¶¶ 5-26, passim.

Analogous claims were made to the Commission in its cable TV rate regulation proceedings.

56. Increased Health, Safety and Environmental Requirements. The requirements in state and local laws and agreements related to public rights-of-way that affect the public health, safety and the environment have increased over time. Specifically, the requirements being imposed now are generally greater than those imposed five to ten years ago, let alone 20 to 50 years ago or in the late nineteenth century.

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[13] See, for example, Tennessee cases cited above in footnote 11. For an example involving electric companies, see Traverse City v. Consumers Power Co., 340 Mich. 85; 64 N.W.2d 894, (1954) (indefinite franchise awarded under 1905 statute upheld).

57. Some of these requirements, as well as the reasons for them, have been alluded to in preceding portions of this filing. This Commission should be aware that there are others as well. Examples of some with health, safety, and environmental impacts are as follows:

58. Construction requirements are much more detailed than they were in the past. These include provisions on following municipal standards and manuals of uniform traffic control devices when entities are working in the rights of way; provisions to protect fragile soils or other environmentally sensitive areas (such as when working on roads on slopes or in other environmentally fragile areas (*see* ¶ 66 below)); requirements for work in the rights of way in or near wetlands, streams, ponds, and rivers (*see* ¶ 64 below); and safety related requirements under state and local equivalents of OSHA.

59. Some requirements are more of an aesthetic nature, especially those relating to work on streets or highways in historic areas (which are present in many communities in Michigan and in the United States).[14]

60. An evolving set of requirements relate to utility crowding and the efficient use of increasing congested public rights of way. These include provisions requiring a provider excavating a street to install extra blank conduit so as to prevent needless excavation of the same right of way in the future and to readily allow its use by additional facilities (including those of subsequent providers) if the street is at or near capacity in terms of the facilities it can easily accommodate; relocation provisions such as those described in prior portions of this filing (which also aid

[14] As noted above, an EIS is required for Federal action affecting highways listed or eligible for listing in the National Register of Historic Places.

appropriate usage of the right-of-way by additional providers); requirements for removal of obsolete facilities not being held for future use; and requirements for ingress to buildings from side or rear streets in areas where there is congestion in the utilities in the street on which the building fronts.

61. Environmentally related requirements include many of the construction related items described above. They also include restrictions and requirements on trimming trees, shrubs, and other vegetation in the rights of way, and requirements on landscaping and reforestation.

62. A significant requirement relates to the National Pollution Discharge Elimination System (NPDES) where strict requirements are imposed by states and municipalities to prevent soil and sediment from washing into sewers or storm drains from construction in the public rights of way. Such pollution often flows directly from storm drains into waterways. States and municipalities often impose soil erosion and sedimentation control ordinances both to prevent such pollution and because as the owner of the storm sewer facilities in question (and holder of an NPDES discharge permit for them) states and municipalities are financially responsible for pollution discharges from storm sewers in excess of those set forth in their NPDES permit.

63. An example of the preceding is Michigan's Soil Erosion and Sedimentation Control statute, MCL § 324.9101 and following, which dates in part from 1970. In general, this statute prohibits any "human-made change in the natural cover or topography of land, including cut and fill activities, which may result in or contribute to soil erosion or sedimentation of the waters of the state" without prior approval under the Act. Id.; MCL § 324.9112. Such approval may be obtained from a city, village or charter township which has adopted an appropriate soil erosion and

sedimentation control ordinance. Id. Most Michigan municipalities, as a result, have adopted such an ordinance which applies, among other things, to construction in the public rights-of-way.

64. Michigan's Wetland Protection Act, MCL § 324.30301 and following, generally prohibits construction, operations or development in a wetland. MCL § 324.30304. This includes to placing fill in wetlands, dredging them or draining water from them. Id. This act as well dates back in part to 1970. It has an exemption for the "maintenance, repair or operation of electric transmission and distribution power lines" under certain circumstances, but no such exemption for telecommunications providers. MCL § 324.30305(2)(l) and (m).

65. Michigan's Natural Beauty Roads Act dates in part from 1948. MCL § 324.35701 and following. In general, it allows 25 or more residents to petition a municipality to designate a road as a natural beauty road, in which case construction and the cutting of native vegetation is substantially restricted. MCL §§ 324.35702, 35704. For example, no construction or substantial damage to native vegetation is allowed without prior municipal approval, which includes a notice and public hearing. Id. However, the restrictions in question do not apply to a public utility's right to control vegetation affecting facilities that were there prior to a road receiving its natural beauty designation. Id.

66. Finally, the Michigan Sand Dune Protection and Management Act is part of a class of statutes which restrict development on steep slopes, such as in mountainous or other environmentally sensitive areas.[15] MCL § 324.35301. Among other things, the Sand Dune

[15] The western shore of Michigan's lower peninsula contains the world's largest moving sand dunes which are up to 600 feet high, several miles across and generally have steep slopes. Certain portions are part of a National Lakeshore administered by the U.S. Park Service or part of state

Protection and Management Act prohibits construction, including utility construction, without special permits in areas "that [have] a slope steeper than a one foot vertical rise in a three foot horizontal plane" or that is likely to increase erosion or decrease stability. MCL § 324.35316. This Act, in part, dates from 1976.

67. Health and safety oriented requirements include the provision of "as builts" and Geographic Information System (GIS) computer layers upon completion of construction so that facilities in the rights-of-way can be quickly located and identified in the future. Related provisions include mandatory participation in utility facility notification programs such as Michigan's so-called "Miss Dig" program, MCL § 460.701 and following. The Miss Dig statute was adopted in 1974 and was one of the earliest such programs in the country. Some states are still adopting statutes for such programs. Related provisions provide for the immediate location of facilities (in person or on engineering drawings) in the event of a public emergency. Finally, some provisions allow public authorities to remove or damage utility facilities in the event of a public emergency.

68. The preceding provisions individually and collectively protect the public health, the public safety and the environment.

69. If the Commission grants Chibardun's request to limit the provisions a state or local government can impose on new providers to only those provisions it can concurrently apply to all telecommunications providers it will be preempting some or many of the health, safety and environmentally-oriented provisions described above. For this reason, an EIS is required.

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parks.

70. In the EIS, this Commission must analyze and determine, state by state, and in some cases incumbent provider by incumbent provider or even municipality by municipality, which health, safety or environmentally-oriented restrictions cannot be applied to the incumbent provider. This will allow an accurate determination of -- and subsequent minimization of -- those environmental, health and safety requirements which the Commission is preempting, and therefore potentially limiting (according to Chibardun) state and local governments to requirements of that nature which were in effect at a much earlier point in time, such as in the late nineteenth century.

71. Historic Highways. As described above, an EIS is normally required for Federal actions that may affect highways listed or eligible for listing in the National Register of Historic Places. There are many such highways and streets in Michigan and in other states ranging from the colonial era (*e.g.*, Williamsburg, Virginia; Mackinac Island, Michigan) to historic areas of more recent vintage. This Commission must conduct an EIS of the effect its decision in this case may have on state or local laws or agreements relating to such highways.

72. Environmental, Health and Safety Preemption. As described above, Chibardun has specifically affirmed the point made by this filing, namely that it is expressly asking this Commission to preempt state and local environmental, health and safety requirements. Petition, at 13. For the reasons set forth above, an EIS is required.

Conclusion

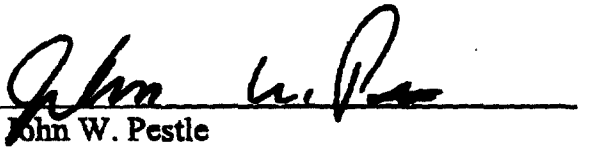
73. Chibardun's Petition if granted in whole or in part could significantly restrict the requirements which League members and other municipalities may impose on telecommunications providers. The League has shown how preempting these requirements both directly and indirectly

may have profound environmental, health, and safety impacts nationwide and affect historic highways. For this reason the Commission must conduct an Environmental Assessment and prepare an Environmental Impact Statement.

74. The Environmental Assessment and EIS processes must be conducted in conformance with the requirements of the CEQ which include public input and comment, and in particular coordination with and participation by affected units of state and local government. The entire environmental process at the Commission must be conducted so as to have a practical input into the Commission's decision-making processes such that alternative causes of action are identified and environmental effects minimized. In particular, this includes identifying with specificity any potential conflicts with environmental, health, or safety requirements relating to the public rights-of-way of state and local governments and minimizing such conflicts.

Respectfully submitted,

Michigan Municipal League

By: 

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CERTIFICATE OF SERVICE

I, Nikki Klungle, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 6th day of January, 1998, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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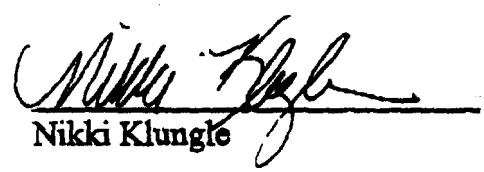

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